In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1975

SAMUEL G. FERRARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of making and subscribing income tax returns for the years 1966 through 1971, which contained written declarations that they were made under the penalties of perjury, and which he did not believe to be true and correct as to every material matter, in violation of 26 U.S.C. 7206(1); he was also convicted of conspiring to obstruct the enforcement of state criminal laws with the intent to facilitate an illegal gambling business, in violation of 18 U.S.C. 1511. Petitioner was fined $30,000 plus costs and sentenced to six years' imprisonment and five years' probation.

Petitioner does not contest the sufficiency of the evidence, which is summarized at Pet. 4-7. He contends only that he was denied an adequate bill of particulars and that his cross-examination of a witness was improperly limited.

1. Petitioner contends (Pet. 7-9) that the trial judge erred in refusing to order the government to include in the bill of particulars a list of prospective witnesses expected to testify concerning petitioner's receipt of items of unreported income. But a defendant in a tax prosecution is not entitled as of right to pretrial disclosure of the source of each item of unreported income. *Azcona* v. *United States*, 257 F. 2d 462 (C.A. 5). Nor is he entitled to a list of prospective government witnesses in the bill of particulars. See, *e.g.*, *United States* v. *Addonizio*, 451 F. 2d 49, 64 (C.A. 3), certiorari denied, 405 U.S. 936. A motion for a bill of particulars is addressed to the sound discretion of the trial court. *Wong Tai* v. *United States*, 273 U.S. 77. There was no abuse of discretion here.

The bill of particulars furnished to petitioner sufficiently informed him of the specific nature of the charges against him to enable him to prepare for trial. The bill of particulars set forth the government's theory of proof (omission of specific income items from petitioner's return), the nature of the unreported items (rackets payoffs), the amount of income unreported each year (approximately $72,000), and the name of the principal payor (Anthony Grosso). Indeed, petitioner concedes (Pet. 10) that Grosso, who paid petitioner approximately $60,000 annually during the years in question, was the key government witness and that the three witnesses not named in the bill of particulars were not essential to the government's case. Moreover, petitioner does not contend that he was surprised by the appearance of those witnesses at trial, nor does he allege any specific prejudice arising from the refusal to disclose. Furthermore, the government had valid grounds for opposing disclosure.[1]

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[1]The government opposed disclosure because it had learned of attempts to intimidate prospective witnesses, and the trial judge was so informed (see our brief in the court of appeals, p. 36).

The trial court therefore acted properly in refusing to compel disclosure.

2. Petitioner also contends (Pet. 9-14) that his cross-examination of Grosso was improperly limited in that he was not permitted (a) to inquire into the names of other police officers to whom Grosso had made illegal payments, (b) to establish the precise language and manner of Grosso's concededly false testimony on specific occasions between 1950 and 1964 that he was not involved in illegal gambling, and (c) to show by independent proof that Grosso was lying when he testified in this case that he terminated his illegal gambling activities in 1971.

(a) The trial court properly refused to permit defense counsel to interject irrelevant collateral issues relating to alleged payoffs to other police officers. As the trial judge correctly explained (Tr. 592-593),[2] testimony as to such payoffs would have been unfair to the other police officers, who would have had no adequate opportunity for rebuttal.

(b) Defense counsel cross-examined Grosso with regard to his testimony, given under oath on specific occasions between 1950 and 1964, that he was not involved in illegal gambling, and Grosso admitted that that prior testimony had been false (Tr. 528-529). The trial court properly exercised its discretion in refusing to permit defense counsel to cross-examine Grosso more extensively concerning the particular details of his prior testimony. Further examination on that point would have merely harrassed the witness, confused the jury, and lengthened the trial.

(c) Grosso testified that his illegal gambling activities terminated in 1971. Defense counsel sought to disprove this fact, which was wholly unrelated to petitioner's

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[2] "Tr." refers to the transcript of trial proceedings.

guilt or innocence, through the testimony of other witnesses. The trial judge properly refused to permit impeachment through third-person testimony. Character impeachment by proof of alleged misconduct that has not resulted in conviction of an offense is properly limited to the cross-examination of the witness whose credibility is under attack, and the answer given by the witness on cross-examination concludes the matter. *United States* v. *Keefer*, 464 F. 2d 1385, 1387 (C.A. 7), certiorari denied, 409 U.S. 983; *United States* v. *Bowe*, 360 F. 2d 1, 14 (C.A. 2), certiorari denied, 385 U.S. 961; *United States* v. *Sweeney*, 262 F. 2d 272, 277 (C.A. 3).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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